MOTION FILED
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No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Central States, Southeast and Southwest Areas Health and Welfare Fund ("Central States") sought consent from the parties to this proceeding to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari. Petitioner has consented to the filing but Respondents have declined to consent. Accordingly, for the reasons stated below, Central States moves this Court pursuant to Rule 37 of the Rules of the Supreme Court of the United States for leave to file an *amicus curiae* brief in support of the Petitioner.

Central States is an "employee welfare benefit plan," and "employee benefit plan," and a "multiemployer plan" within the meaning of Sections 3(1), 3(3), and 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1), 1002(3), and 1002(37)(A). Central States provides health benefits to approximately 100,000 active participants and 25,000 retirees. In general terms, the cost of providing health coverage increases as participants get older. Thus, the cost of providing health coverage to retirees is relatively high as compared to active participants (who have a much younger average age as a group). Within each group, average costs increase as well depending upon the age of the participant and retiree.

Because the average cost of providing health coverage in general, and to retirees in particular, is growing at an astronomical rate, an employee welfare plan such as Central States has only three options. First, Central States could eliminate coverage for retirees which would, in many instances, eliminate the only affordable health coverage that the retirees could acquire. Second, Central States could charge a premium to the retirees reflecting the full cost of providing health coverage. However, this cost would be prohibitively high for most of the retirees. Third, Central

States could charge higher premiums to younger active participants or younger retirees in order to subsidize the cost of the health coverage provided to the retiree.

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §§ 621-634, contains provisions that have bearing on the provision of welfare benefits and pension benefits by employers. For example, Section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), allows an employer to observe the terms of a bona fide employee benefit plan where the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. Other examples are Sections 4(i) and 4(l) of the ADEA, 29 U.S.C. §§ 623(i) and 623(l), which allow pension plans to contain various age-based terms. Prior to the decision below, health benefit plans believed (and courts held) that discrimination *in favor of* older persons did not violate the ADEA. The decision below, if left intact, will make it difficult, if not impossible, for health plans to continue to provide retiree health coverage (at least without making the premiums cost prohibitive to the retirees), to the extent discriminating *in favor of* older persons is a violation of the ADEA. Such an interpretation of the ADEA is contrary to the language in the ADEA which states that the ADEA's goal is to protect older workers.

Central States has specialized experience in administering an ERISA health plan that is national in scope. Further, Central States is jointly administered with the largest multi-employer pension plan in the United States, the Central States, Southeast and Southwest Areas Pension Fund, giving Central States experience in administering an ERISA pension plan as well. The expertise that Central States has in dealing with ERISA matters will provide a perspective that is different than the parties and, more important, allows Central States to identify the dangers and flaws of the decision below that have an impact far greater than on the parties themselves. For these reasons, Central States requests that this Court grant Central States' Motion for Leave to File Brief *Amicus Curiae*.

Respectfully submitted,

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BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF CENTRAL STATES

Central States is an "employee welfare benefit plan," and "employee benefit plan," and a "multiemployer plan" within the meaning of Sections 3(1), 3(3), and 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1), 1002(3), and 1002(37)(A).[1] Central States provides health benefits to

[1] Pursuant to Rule 37.6, Central States represents that this brief has been authored solely by counsel for Central States and no party other than Central States has made a monetary contribution for the preparation or submission of this brief.

approximately 100,000 active participants and approximately 25,000 retirees. In general terms, the cost of providing health coverage increases as participants get older. Thus, the cost of providing health coverage to retirees is relatively high as compared to active participants (who have a much younger average age as a group). Within each group, average costs increase as well depending upon the age of the participant and retiree.

Because the average cost of providing health coverage in general, and to retirees in particular, is growing at an astronomical rate, an employee welfare plan such as Central States has only three options. First, Central States could eliminate coverage for retirees which would, in many instances, eliminate the only affordable health coverage that the retirees could acquire. Second, Central States could charge a premium to the retirees reflecting the full cost of providing health coverage. However, this cost would be prohibitively high for most of the retirees. Third, Central States could charge higher premiums to younger active participants or younger retirees in order to subsidize the cost of the health coverage provided to the retiree.

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §§ 621-634, contains provisions that have bearing on the provision of welfare benefits and pension benefits by employers. For example, Section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), allows an employer to observe the terms of a bona fide employee benefit plan where the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. Other examples are Sections 4(i) and 4(l) of the ADEA, 29 U.S.C. §§ 623(i) and 623(l), which allow pension plans to contain various age-based terms. Prior to the decision below, health benefit plans believed (and courts held) that

discrimination *in favor of* older persons did not violate the ADEA. The decision below, if left intact, will make it difficult, if not impossible, for health plans to continue to provide retiree health coverage (at least without making the premiums cost prohibitive to the retirees), to the extent discriminating *in favor of* older persons is a violation of the ADEA. Such an interpretation of the ADEA is contrary to the language in the ADEA which states that the ADEA's goal is to protect older workers.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding in *Cline v. General Dynamics Land Systems, Inc.*, 296 F.3d 466 (6th Cir. 2002), that the ADEA prohibits reverse age discrimination, conflicts with the Seventh Circuit's holding to the contrary in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992); *see also Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.) (stating that the ADEA "does not forbid treating older persons *more* generously than others"). The conflict created by the decision below should be resolved by this Court because the Sixth Circuit's holding that the ADEA prohibits discrimination *in favor of* older workers has consequences far beyond the specific context of the case before the Court. This conflict raises concrete issues for Central States and other health plans that cover participants who reside in both the Sixth and Seventh Circuits. Specifically, the decision will make it difficult, if not impossible, for health plans to provide health coverage to older workers, as well as retirees, because many plans depend on younger workers to subsidize the cost of providing coverage to older workers. Moreover, as demonstrated below, the Sixth Circuit's result cannot be squared with a reading of the ADEA in its entirety.

The Sixth Circuit relied on two principal arguments in support of its conclusion that the ADEA prohibits reverse age discrimination. First, the Sixth Circuit relied on the argument

that the ADEA prohibits discrimination against any individual because of such individual's age. *Cline*, 296 F.3d at 469; 29 U.S.C. § 623(a)(1). Although the Sixth Circuit acknowledged that the statute also expresses that the purpose of the statute is to protect older workers, 29 U.S.C. § 621, the Sixth Circuit believed that the specific language of the statute governed over the more general provision. *Cline*, 296 F.3d at 470-71. Second, the Sixth Circuit relied upon the argument that a regulation promulgated by the EEOC, 29 C.F.R. § 1625.2(a), indicates that discrimination is prohibited by the ADEA even if the discrimination is in favor of an older worker. *Cline*, 296 F.3d at 471. The concurrence relies on yet a third argument, namely, that the provision in the ADEA which allows an employer to set a minimum age as a condition for eligibility in a pension plan, 29 U.S.C. § 623(l)(1)(A), would be meaningless if discrimination against younger employees was not prohibited by the ADEA. *Cline*, 296 F.3d at 473 (Cole, J., concurring). However, none of these arguments withstands close scrutiny.

The Sixth Circuit was certainly correct in stating, as a general interpretive principle, that the specific language of the statute governs the general. However, the Sixth Circuit ignored the canon that interpretation of a statute is a holistic endeavor and that the meaning of one provision of the statute must be compatible with the rest of the law. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001). Although the Sixth Circuit correctly noted that the ADEA's protected class of individuals is limited to those individuals 40 years old and older, the Sixth Circuit did not fully explore the implication of this fact. As this Court has held, age is not a suspect classification under the Equal Protection Clause. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000). However, even though rational basis review does not require that age distinctions and the legitimate interests they serve match with razorlike precision, *id.*, there must still be rational connection between the policy

underlying the age discrimination and the interest sought to be served.

In this case, Congress sought to protect older workers in enacting the ADEA. 29 U.S.C. § 621. However, it did not seek to do so in a vacuum. As this Court has previously recognized, Congress enacted the ADEA to counteract the effect of "inaccurate and stigmatizing stereotypes" that the performance of older workers was not as good as that of younger workers. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993). Under rational basis review, Congress was certainly free to create a protected class of individuals 40 and older because Congress believed that this class of individuals was most likely to be the victims of such stereotypes. In contrast, it would not be rational for Congress to limit the protected class to individuals 40 and over if Congress intended to protect individuals because of their relative youth. In this scenario, the younger the worker, the more likely the worker would be subject to such discrimination, meaning that limiting the protected class to individuals 40 and over would be entirely irrational. Just as this Court recognized in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-13 (1996), the difference in age between a plaintiff and the person who replaced him, not the age of the worker or his replacement, is a reliable indicator of age discrimination. The relevant test under the ADEA for whether an employee was discriminated against because he was too young would be if the employee was substantially younger than the person receiving more favorable treatment.

However, under the ADEA, such a result would be impossible because the younger employees would be outside the protected class. It is not rational to conclude that Congress sought to prevent discrimination against *younger* workers while at the same time limiting the protected class to those individuals 40 and older. It would be precisely those individuals *below* the age of 40 that would be more likely to

need such protection. In fact, although Congress found that discrimination against older workers was founded on inaccurate stereotypes, no such finding was made with respect to discrimination against younger workers. The Constitution itself "discriminates" against the young in various circumstances. U.S. Const. Art. I, § 2, cl. 2 (Representative must be 25 or older); U.S. Const. Art. I, § 3, cl. 3 (Senator must be 30 or older); U.S. Const. Art. II, § 1, cl. 5 (President and Vice-President must be 35 or older). If Congress felt that such "discrimination" against younger individuals was merely an inaccurate stereotype, certainly it would have made such belief plain. *Cf. Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (Court does not presume a change in existing substantive law unless intent to make such a change is clearly expressed). Thus, construing the ADEA to bar reverse discrimination when the class of persons protected is arbitrarily limited to those age 40 or above creates an irrationality that would call the ADEA's constitutionality into question. The Court should avoid such a construction of the statute that creates serious constitutional doubt unless such construction is plainly the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, however, the statute itself makes it clear that Congress' intent was to protect older workers from being discriminated against because of the inaccurate stereotype that older workers could not perform their jobs as well as younger workers. Nowhere is there any suggestion that Congress believed the converse to be true.

Second, the Sixth Circuit also relied upon the fact that the regulations, specifically 29 C.F.R. § 1625.2(a), indicate that an employer may not discriminate against persons in the protected class on the basis of age regardless of whether the discrimination is in favor of the older worker. From this, the Sixth Circuit concluded that the EEOC interpreted the statute to mean that discrimination in favor of older workers is

prohibited. However, the Sixth Circuit did not address the next subsection of the same regulation which provides in pertinent part:

> The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination.

29 C.F.R. § 1625.2(b). If, as the Sixth Circuit asserts, the statute prohibits age discrimination in favor of older employees, Section 1625.2(b) would not be permissible since it would not matter whether the discrimination was beneficial to older employees because it would still be discrimination. Yet Section 1625.2(b) implicitly recognizes that doing an act that would benefit older workers is *not* a violation of the ADEA even if the employer is using age as a criterion. In short, the regulations are far from clear in stating a coherent picture as to the meaning of the statute.

Third, the concurrence in *Cline* relied upon the fact that the ADEA permits a pension plan to use a minimum age requirement for eligibility in the plan. 29 U.S.C. § 623(l)(1)(A). From this fact, the concurrence reasoned that the ADEA must prohibit reverse age discrimination because otherwise there would be no need for such a provision. However, as demonstrated by cases such as *Lyon v. Ohio Educ. Ass'n & Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995), and *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988), older workers may argue that setting a minimum age too low discriminates against older workers because it may allow younger workers to receive the same benefit as older workers even though the older workers have worked for the employer for a longer period of time. This provision of the ADEA, that was not even present until the ADEA was amended by OWBPA, reflects an abundance of caution to protect employers from claims such as those made

in the *Lyon* and *Karlen* cases. *Cf. Fort Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 646 (1990) (recognizing that provisions may be added to statute out of an abundance of caution).

Finally, recognizing a claim of reverse age discrimination under the ADEA would undermine the goal of the ADEA to protect older workers. As noted by the Seventh Circuit in *Karlen*, recognizing reverse age discrimination claims would deter employers from offering programs that are beneficial to older workers. 837 F.2d at 317-18. Further, it would prevent health plans from using higher premiums from younger workers to subsidize benefits for older workers resulting either in eliminating coverage for older workers and retirees or increasing the premium for older workers and retirees to a cost prohibitive level. The ADEA should not be read in such a way as to defeat its goal of protecting older workers. *See Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995) (elementary rule of construction is that an act may not be construed to destroy itself).

CONCLUSION

For the reasons stated, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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